No. 3058

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. C. ADAMS,

Appellant,

vs.

YUKON GOLD COMPANY (a corporation), W. A. DIKEMAN, JOHN BEATON, THOMAS P. AITKEN, RAE B. CARTER, P. F. STIMLEY and TOM DAVIS,

Appellees.

BRIEF FOR APPELLANT.

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Statement of Case.

This is a suit to quiet title to certain mining property described as the Anaconda Fraction and the Anaconda No. 2 situated on the left limit of Otter Creek, in the Otter Recording District, District of Alaska. The plaintiff in the court below (the appellant herein) claims the placer ground in controversy by reason of two locations, one known as the "Anaconda Fraction" made on the 23rd day of May, 1911 (Tr. pp. 35, 36, 37 and 38), and the other the "Anaconda No. 2" made on July 19, 1913 (Tr. pp. 46, 47 and 48), the latter including within

its boundary all of the ground embraced within the Anaconda Fraction, together with some additional ground.

The defendants (appellees herein) claim that they and their grantors located the ground in controversy in April, 1909, as part of the Prospector Association Claim.

It is conceded in the record (Tr. p. 78) that the said Prospector Association Claim at the time it was located and marked on the ground contained an area of 187 acres or an excess of 27 acres, and the notice of location of said Prospector Claim (Tr. p. 45) called for 5280 feet by 2640 feet or 320 acres.

It is undisputed in the record that appellant had permission from two of the eight locators of the Prospector Association Claim to stake the excess area off of either side or end of said claim. In March or April, 1911, before he located the Anaconda Fraction it is also admitted that most of the locators of said Prospector Claim were out of the country, or not in the mining vicinity at that time.

The appellant asserts he made the location of the Anaconda Fraction in May, 1911, after obtaining the consent of Chittic and Muckler, two of the eight locators of the said Prospector Claim, and one of whom (Chittic) was then in possession of the whole of said claim as such owner and lessee engaged in working the claim.

The appellant further asserts he made a diligent search (Tr. p. 58) to find some of the other owners of the Prospector Claim, most of whom were out of the country, and some of whom never did live in that vicinity.

Appellant further asserts that after 1911, and for more than two years after said owners knew that appellant had located the fractional excess, they neglected and failed to cast off the excess, and appellant to doubly secure his title to the ground in controversy, made a location of the Anaconda No. 2 Claim in July, 1913, taking in the excess ground, and notwithstanding the continuous notice and knowledge of appellees, that appellant was in possession, living upon and working the excess area, they still neglected and failed to cast off or correct their lines until more than six months after appellant had commenced this suit to quiet his title to the ground in controversy; that such conduct on the part of appellees showed a fraudulent intent on their part to hold more ground than the law permitted and rendered their claim void as against the appellant.

The appellant after locating the Anaconda Fraction in May, 1911, continued in possession of the ground during the year 1911 and performed mining operations on the same, and again in 1912 and in 1913, at all times in plain view and with the knowledge of appellees.

The appellant commenced this suit to quiet title on the 25th day of July, 1913, claiming in his com-

plaint (Tr. p. 3) the ground in controversy under his two locations and praying the court to quiet his title to same.

Thereafter the defendants filed their answer (Tr. p. 6) claiming that the ground in controversy embraced in the Anaconda Fraction and the Anaconda No. 2 was part and parcel of the Prospector Association Claim located by them and their grantors on the 10th day of April, 1909. To this the plaintiff replied (Tr. p. 9) alleging that the said Prospector Claim contained an excessive area to the extent of 27 acres, which the appellees with full knowledge of said excess neglected and refused to cast off.

Upon the issues thus made by the pleadings the cause came on for trial before the court which made its findings of fact and thereafter entered its decree on the 16th day of August, 1916 (Tr. p. 32), dismissing plaintiff's suit and adjudging the appellees to be the owners of the ground in controversy, from which decree the appellant appeals.

Specification of Errors.

1. The court erred in finding, contrary to the evidence, that some of the owners (other than Chittic and Muckler) of the Prospector Claim were well-known in the vicinity of the ground in contro-

versy and were living in close proximity thereto (Assignment of Error No. 1).

2. The court erred in finding, contrary to the evidence, that as marked upon the ground the Anaconda Fraction's exterior boundaries did not cover or adjoin any boundary line of the Prospector Association Claim and that the Anaconda Fraction was not located at one end or one side of said Prospector Claim (Assignments of Error No. 2 and No. 5).

3. The court erred in finding, contrary to the evidence, that on and prior to July 13th, 1913, the locators and owners of the Prospector Claim had no notice or knowledge of the fact that the said Prospector Claim contained more than 160 acres or an excess area (Assignment of Error No. 3).

4. The court erred in finding, contrary to the evidence, that the southerly boundary line of said Anaconda No. 2 Placer Claim is not co-extensive with the southerly boundary line of said Prospector Claim (Assignment of Error No. 4).

5. The court erred in finding, contrary to the evidence, that the locators and owners of the said Prospector Claim did not acquire notice that said claim contained an excess in area until after the commencement of this suit (Assignment of Error No. 6).

6. The court erred in finding, contrary to the evidence, as conclusions of law, that the Anaconda Fraction and the Anaconda No. 2 placer claims

were and are null and void and that the said Prospector Claim was valid and entitled appellees to the possession of the ground in controversy as against the appellant (Assignment of Error No. 7).

7. The court erred, contrary to the evidence and law, in entering its judgment and final decree in favor of appellees and against appellant dismissing plaintiff's suit (Assignment of Error No. 8).

8. The court erred in not finding as a fact from the evidence that the locators and owners of the Prospector Claim had notice of the excess area contained within the exterior boundaries of said claim and failed to cast off such excess within a reasonable time after such notice (Assignment of Error No. 9).

9. The court erred in not finding as a fact from the evidence that the appellant did locate a portion of the excess area of said Prospector Claim off of the southerly side of said Prospector Claim in accordance with the request and consent of said Chittic and Muckler (Assignment of Error No. 10).

10. The court erred in not finding as a conclusion of law from the evidence that the consent of Chittic and Muckler that appellant could locate the excess area contained within the boundaries of the Prospector Claim was binding upon the co-tenants of said Chittic and Muckler in said Prospector Claim and that notice to them was also notice to their co-tenants and that appellant's locations

were good and valid and entitled him to the relief demanded (Assignment of Error No. 11).

11. The court erred in not making and entering its decree in favor of appellant for the relief demanded in his complaint (Assignment of Error No. 12).

Argument and Authorities.

All the errors specified center upon and revolve around the contentions of appellant that the Honorable Trial Court, contrary to the law applicable, and the great weight of the evidence submitted, as disclosed in the record, erred in entering its decree for appellees instead of for appellant, based upon findings of fact and conclusions of law contrary to the evidence, and wholly unsupported thereby.

If this had been a law action, tried before a jury and the verdict had been for appellees, under the law applicable and the preponderance of the evidence, the trial court should have set aside the verdict by granting a new trial. So in this respect it being an equitable suit it is now here on appeal for this Honorable Court to review both questions of law and fact and to determine if the decision of the trial court by its findings was not only contrary to the evidence adduced at the trial, but in many instances wholly unsupported by any evidence whatever.

There is no serious conflict of legal principles in the case; neither are there many disputed facts.

Appellant contends that there has been a misapplication of legal principles to the facts admitted and proven at the trial.

Contentions of Appellant.

Appellant contends that at the trial it was proven conclusively, as shown by the record, as follows:

1st. That Chittic and Muckler, owners of an undivided one-fourth of the Prospector Claim, and Chittic as lessee of the whole thereof and then in possession, gave their consent, permission and authority to Adams, the appellant, to locate the excess area.

In support of this contention appellant directs the attention of the court to the following undisputed evidence as disclosed in the record:

S. C. Adams (Appellant)

(Tr. pp. 35 and 36) testified as follows:

> "Q. Do you know where the Prospector Association was situated at that time?
>
> A. Yes, sir.
>
> Q. Did you ever locate any portion of the Prospector?
>
> A. I did.
>
> Q. When did you first make up your mind to locate a portion of the Prospector?
>
> A. It was some time in the latter part of March or first of April in 1911.
>
> Q. What, if anything, did you do when you made up your mind to locate that portion of the Prospector?
>
> A. I had learned that Mr. Cash Chittic and Jim Muckler had an interest in the Prospector. And one afternoon in Conley's Saloon

in the presence of William Lang, Star Ballard and Charley Krutzinger, Mr. Cash Chittic and Mr. Jim Muckler were in the office and I told them that I wished to stake a fraction off the Prospector, as I considered it too large, and they informed me that if it was too large,—in excess of 1320 feet by 5280 feet,—that I could stake a fraction at either side or end that I wished.

Q. Let me get that right. What did they say to you?

A. They said that I could stake a fraction at either side or end.

Q. Not that. What I meant—something about 'too large'.

A. If it was in excess— (interrupted).

Q. I didn't understand that.

A. (continuing). Of 1320 feet by 5280, or 160 acres, as all they claimed was 160 acres.

Q. Who told you that?

A. Mr. Chittic and Mr. Muckler.

Q. How did Chittic and Muckler come to tell you that?

A. Mr. Chittic had been prospecting there, and Mr. Muckler lived up around Otter, and I told them the claim was too big, and they said if it was too big I could stake that fraction.

Q. What relation did they have to the claim?

A. They claimed they had an interest in the Prospector, and Mr. Chittic I believe at that time had a lay.

Q. What did you do then?

A. Along in May I believe it was the 22d of May, I measured the Prospector, William Lang and I. We hired a man by the name of Puntila to help us measure the Prospector.

Q. What did you do then?

A. We measured it and found it too wide, and made a discovery on the 22d—I believe it was the 22d—and on the 23d— (interrupted).

The COURT. 22d of what?

A. Of May, 1911. On the 23d of May we staked it—staked the Anaconda, 120 feet wide by 2640 feet long."

Again, on cross-examination (Tr. pp. 55 and 56), S. C. Adams (appellant) testified as follows:

"Q. When was it that you say you talked to Cash Chittic and Jim Muckler?

A. It was some time the latter part of March or the first of April, 1911.

Q. And what did they tell you?

A. They told me that I could stake a fraction at either side or end that I wished, if the Prospector was in excess of 1320 feet by 5280 feet, as all they claimed was 160 acres.

Q. How did that conversation happen to come up at that time? Did you then know or have an idea that the Prospector was excessive?

A. I did. Yes, sir.

Q. When had you found that out?

A. There were different men I talked to that year and different interests being bought—some interests being bought in the Mohawk at that time. And I was figuring on getting hold of some ground if there was any ground to be had, and I had been over the Prospector and Mohawk many times.

Q. You had been over the Prospector before the 22d of May with a view of ascertaining if there was any excess?

A. If it was large. And I always thought it was large every time I had been over it.

Q. Did you tell Cash Chittic and Muckler that it was excessive?

A. I told them I thought it was large.

Q. What did you tell them, as near as you can recollect now?

A. I told them I thought it was in excess of 160 acres.

Q. But you never told them at any one time, as a matter of fact, that it was excessive?

A. Not to my knowledge.

Q. What reply did they give to you?

A. They told me at that time that if it was in excess of 1320 feet by 5280 feet that I could stake at either side or end that I wished."

CHARLES KREUTZINGER,

a disinterested witness, undisputed and unimpeached, testified as follows (Tr. pp. 104 and 105):

"Q. What was that conversation, as nearly as you recollect?

A. Well, it was in regard to staking some excess. I couldn't state word for word because I don't recollect; as I recollect it, is the best I can do. Well, Adams told, as I recollect, that the claim was in excess of 160 acres, and if they had any objection to his staking the excess, and they said 'No', as I recollect. I know that both of them agreed to—they were perfectly well willing that if there was over 160 acres, that it should be taken off."

Again, the same witness on cross-examination (Tr. p. 107) testified as follows:

"Q. I am asking you what you said about this Prospector Claim on that occasion.

A. Well, I have stated all I said at that time. Adams was asking Muckler about the claim. Adams said that the claim was in excess; I wouldn't be sure that he said 'excess'. He said it was too big, or in excess. I wouldn't be sure. I am quite sure he said it was in excess..

Q. Did he say to them that he had measured the claim?

A. No, not to my recollection. I don't know, whether or not I would recollect if he

had said it. Both of them answered Adams in this conversation. Muckler said it was all right with him. Chittic said similar. I don't recollect just what it was. Chittic said, to my recollection, that it was all right. I don't recollect whether they were all in the saloon or not, when I came in. I was in there collecting a bill. I had no interest in the matter at that time. This conversation took place at the time in the office, possibly they were all sitting in the office. I am not sure that they were. We all went out together and at one time we were all in the office together. I am positive that this conversation took place in the office. Sam Ballard was there. I don't recollect whether the bartender was in there or not. I don't recollect how long I had been there when Muckler and Chittic came in. I don't recollect who came in first. I recollect the talk about this excess. They talked about this claim being too big—the Prospector Claim. I remember that positively."

There is not a syllable of testimony in the transcript to contradict these two witnesses on this point, and neither of the witnesses were impeached in the slightest particular, so it should be taken for granted that this contention was proved at the trial. The defendant John Beaton admits that Chittic was working on the claim in 1911 (Tr. p. 94). The same witness again (Tr. p. 97) says:

"C. C. Chittic and Andy Chittic worked on this claim in 1911. They had a written lease from the owners that was around there at the time."

2nd. That the consent, permission and authority given by Chittic and Muckler to appellant and the

admission of notice thereby was binding upon all the co-tenants of said Prospector Claim.

While it may be conceded that there is some reason or logic why one co-tenant may not bind another co-tenant in transferring property without specific authority, there is neither reason nor logic why notice of excess in area to one co-tenant is not notice to all co-tenants and binding upon them. Where a mining claim is owned by a single owner, it is a simple matter to give him direct notice, but where a claim is owned by eight or more owners, as was the Prospector, many of whom were out of the country, and as a matter of fact, some of whom never were in the country (Tr. p. 96), and their whereabouts wholly unknown (Tr. p. 97), even to the co-tenants (Tr. p. 100), why would not notice to the co-tenant in possession suffice? Chittic was actually working the claim as owner and lessee when Adams notified them of the excess area. Does the law impose a duty on one seeking to locate the public domain wrongfully and fraudulently held by others to go to the uttermost ends of the earth to notify all interested in the ownership of the prior mining location, or is it sufficient to notify those in possession?

> "Whether the license of one co-tenant to do a particular act with reference to the property of a co-tenant will protect the licensee against the other co-tenant seems not well settled. On principle it would seem that where one co-tenant could himself lawfully perform an act with reference to property belonging to the

tenancy he could lawfully authorize another to do the same thing."

Snyder on Mines, Section 1471;

Southern Railway Company v. Meaher, 238 Fed. 538.

Chittic, a co-owner, could have surveyed the mine and cast off the excess to protect his own rights, regardless of the other co-owners. Then why could he not delegate this authority? In the record we find that one of the co-owners (the Yukon Gold Mining Company), without consulting any of the other co-tenants of the claim, in January, 1914, caused the claim to be surveyed and cast off a portion of the claim as excess without consulting any of the other co-tenants whatever. Then why should they complain because Chittic and Muckler granted the license or permit to appellant Adams to stake the excess off one side or one end?

The general rule seems to be that one co-tenant cannot bind another co-tenant, unless specific authority is granted, except in such cases where the law imposes a duty on him to act to preserve his own estate such as in the case at bar. It was the duty of Chittic and Muckler to either grant permission to the appellant to stake the excess or to measure their claim and cast off the excess in order to protect their rights.

Crary v. Campbell, 24 Cal. 634;

Sharkey v. Candiani, 85 Pac. 219 (Oregon); 7 L. R. A. (N.S.) 809.

In this latter case Candiani staked in part of a claim owned by Sharkey and his co-tenants. They stood by and permitted him to develop the claim. The Supreme Court of Oregon said:

> "To allow them to assert an adverse claim to that part of the Doctor lode now in controversy as it should be surveyed, would be violative of every principle of equity, and result in rewarding them for encouraging the development of the property. Zimmerman who owns five-twelfths of the Lucky Boy group of mines, resides in Portland, and though he knew Candiani had located a mine in the Blue River District, he was not aware that it conflicted with either claim in which he was interested. Frank C. Sharkey as Superintendent and Managing Partner, however, represented Zimmerman and also his predecessor in interest, Moore, in supervising the property; and, though such agent could not ordinarily, without special authority from all the co-tenants abandon any greater interest than he alone possessed, (Beers v. Sharpe, 44 Ore. 386; 75 Pac. 717; Conn v. Oberto, 32 Colo. 313; 76 Pac. 369), the character of his employment and the kind of property in controversy induced the conclusion that he possessed sufficient authority from all the co-tenants to bind them by his negligence in permitting Candiani to take, hold possession of, and improve their property for such a length of time."

3rd. That appellant located the Anaconda Fraction on May 23rd, 1911, according to such consent and at the place and in the manner indicated by Chittic and Muckler.

4th. That said Chittic and Muckler thereafter knew that appellant Adams had staked the excess area of their said Prospector Claim.

This is conclusively shown by the testimony of A. A. Chittic, a brother of C. C. Chittic (Tr. pp. 111-12-13) as follows:

> "Q. Now, in the year 1911, say in the month of September, did you have any conversation or meeting with C. C. Chittic relative to a conversation supposed to have taken place between him and one S. C. Adams, in which the subject of the location of a fraction of the Prospector Claim by Adams came up?
>
> Mr. Hill objected to that unless Adams was present. It is attempting to prove statements to their interest. This is not competent.
>
> The COURT. Just ask whether or not there was any conversation. That may be answered or not.
>
> Mr. RODEN. Did any such conversation take place?
>
> A. It did, in Flat City, at our house; at our home, C. C. Chittic's and mine. I don't think there was anybody but myself present at the time.
>
> Objection by Mr. Hill as not in any way binding upon plaintiff, and strictly hearsay. It is simply a conversation concerning some other conversation.
>
> Objection sustained. After argument:
>
> COURT. I think the shortest way is to allow the question to be answered, subject to your objection, Mr. Hill.
>
> A. He said in regard to Adams staking the fraction, that he had met Adams, and he has said that he had staked a fraction off of the Prospector Association; and he said he had met Adams, who had said: 'I have staked a fraction on the Prospector Association, so I don't suppose we shall be very good friends now.' And my brother said: 'I don't see that that will make any difference as to our being good friends. If the Prospector was in excess of 160 acres, I would just as soon see you stake

it as anybody else.' I should judge this conversation took place in September, 1911.

Q. Now, in reference to this conversation, did your brother say what he had told Adams with reference to casting off on the Prospector, in case there were any?

Mr. Hill objected to that as incompetent and irrelevant, and as not tending to prove or disprove any conversation which C. C. Chittic may have had with Adams.

WITNESS (continuing). I asked him what he had done about it, and he said he had asked Adams where he had located it, and Adams told him he had located it between the Prospector and the Mohawk Association; and my brother said he didn't think that there would be any fraction exist there, not by his consent; he thought he understood in Fairbanks that the first staker had the right to say where the first fraction should be set off, and not by his consent would it be set off there; that he could have it on the side, or on the lower end, that is if one existed."

This notice and knowledge of the fact that appellant Adams had staked a fraction, claiming an excess area of the Prospector Claim, was clearly brought to the attention of C. C. Chittic, one of the co-tenants, in the year 1911, according to the above testimony of his brother, which was offered and received in evidence over the objection of the appellant. It conclusively proves that Chittic had notice that there was an excess area in the Prospector location. In 1911 he was the lessee of the other owners, in the care and custody (Tr. p. 75) and in possession mining the ground, still no effort was made thereafter to cast off the excess until long

after Adams, the appellant, had restaked the ground as the Anaconda No. 2, and had commenced this suit to quiet title.

5th. That such notice of claim of excess area to Chittic and Muckler was sufficient notice to bind all of the tenants of said Prospector Claim.

> "Where one tenant in common acts for all the others in the care and charge of premises held in common, his knowledge will be attributed to his co-tenants."
>
> Ward v. Warren et al., 82 N. Y. 265.

In this same case the court at page 269 says:

> "Where one tenant in common acts for all the tenants, there is no reason why his knowledge may not be attributed to his co-tenants just the same as the knowledge of any other agent could be. What the agent knows about the use of an easement in the premises committed to his charge would be attributed to his principal. Suppose tenants in common should place an improved farm in the charge of an agent, and then be absent for more than twenty years, could they defend against an easement claimed to have been acquired in the meantime, on the ground that they did not have personal knowledge of the easement, although their agent had such knowledge? And it certainly can make no difference that one of the tenants in common acted as agent for his co-tenants."
>
> See also Wade on Notice, Section 672.

The trial court in its decision (Tr. p. 14) says:

> "Plaintiff contends that having entered under the permission thus extended, the remaining co-owners, being tenants in common,

were bound by the act of their co-tenants. I am satisfied this contention cannot prevail."

The trial court completely overlooked and ignored the plain legal proposition arising from the evidence that the other co-tenants were bound by the notice and knowledge of Chittic and Muckler.

The cases cited by the trial court in its decision (Barson v. Mulligan, 16 L. R. A. 151, and O'Hanlon v. Ruby Gulch M. Co., 135 Pac. 913, and other cases cited) are not in point and have no application whatever to the facts in this case. These cases would be in point where one co-tenant attempts to transfer or part with the title to land in which other co-tenants have an interest in common without any specific or direct authority. None of the cases cited by the court even intimate that a co-tenant in possession, and having the care and custody of the tenancy, is not the agent for all of the others to receive notice similar to the notice and knowledge claimed to have been given in this case.

6th. That such notice of claim of excess area by appellant Adams was sufficient then and there to put all the co-tenants upon inquiry, and if they disapproved of his said Anaconda fraction location, they should have cast off the excess area from some other part of the claim within a reasonable time thereafter, which they failed to do.

Where an excessive location of a mining claim has been made through mistake in good faith, as

where the locator sets his stakes and estimates his distances without chain or compass, it is void only as to the excess, but the locator upon acquiring knowledge or notice that the claim contains an excess area must within a reasonable time draw in his lines and cast off the excessive area, otherwise his claim is fraudulent and void against a subsequent locator who locates the excess area.

This doctrine is supported by the following cases:

Gohres v. Illinois Mining Co., 40 Ore. 516;
Stemwinder Mining Co. v. Emma & L. C. Consolidated Mining Co., 21 Pac. 1040; affirmed in 149 U. S. 787;
Richmond Mining Co. v. Rose, 114 U. S. 576;
Walton v. Wild Goose M. & T. Co., 123 Fed. 209;
Zimmerman v. Funchion, 161 Fed. 859;
McIntosh v. Price, 121 Fed. 716;
Waskey v. Hammer, 170 Fed. 31;
Jones v. Wild Goose M. & T. Co., 177 Fed. 99;
Lindley on Mines, Section 362;
Snyder on Mines, Section 398.

In the Jones case (supra) this court says:

> "So in the case at bar, had the plaintiff Jones after giving the owners of the Navajoe notice of the excess waited a reasonable time for them to exercise the right to select and cast off, and then relocated the Papoose Fraction, a very different question would be presented."

That was exactly what Adams did in the case at bar. He staked his Anaconda Fraction in May,

1911, where Chittic and Muckler told him he could stake the excess and after they knew, as Chittic's brother testified, that Adams had staked the excess, they failed, refused and neglected to cast off the excess at any other part of the claim or to draw in their boundary lines in any manner whatever, and Adams after having a written notice served upon him by one of the co-tenants (the Yukon Gold Company) (Tr. p. 44), in order to secure and protect him in his title to the ground, relocated the ground on July 19th, 1913, and named it the Anaconda No. 2 Claim, this relocation being made more than two years after Chittic and Muckler knew that there was an excess area in the Prospector Claim.

In the Jones case Justice Gilbert in dissenting held that under the facts disclosed, the Wild Goose Mining & T. Co., in waiting from September to November, waited an unreasonable time to cast off the excess and that such waiting rendered fraudulent and void the Navajoe location as against the Papoose Fraction. If two months was an unreasonable time in the Jones case, and if as the court intimated, as quoted above, that had Jones relocated the fraction, a different question would have been presented, then surely the trial court in the case at bar should have found as a fact from the testimony that it was an unreasonable time for the owners of the Prospector Claim to wait from April, 1911, to January, 1914, before attempting to cast off the excess area of their claim, and

especially was it an unreasonable time to wait six months longer after this suit was commenced by the appellant before casting off. The appellant commenced his suit on the 25th day of July, 1913, and the Yukon Gold Company, one of the appellees, caused the claim to be surveyed and the excess area cast off in January, 1914, six months after the suit was begun, and especially was this unreasonable in view of the fact that it is admitted in the record that the town of Flat was located on a part of the Prospector Claim where the owners of the claim had easy access to all methods of measuring and surveying that could have been completed in twenty-four hours, as the appellant testified (Tr. p. 50) that that was the time it took him to measure the claim in May, 1911.

7th. That the locators and owners of said Prospector Claim knew that during 1911, 1912 and 1913, appellant was living upon, improving, working and mining the said excess area as a fractional placer claim and within the exterior boundaries and stakes of the said Prospector Claim, still they neglected, refused and failed to cast off the excess area or correct exterior lines of the Prospector Claim.

The evidence clearly preponderates in favor of the proof of this contention. In addition to the testimony quoted above of the notice to Chittic and Muckler, we further cite to the court from the transcript further evidence of notice on the part of the owners of said Prospector Claim.

Appellant Adams testified, and there is not a word of testimony in the record to contradict him, as follows (Tr. p. 39):

"Q. Did you do any work on that claim in 1912?

A. Yes, sir.

Q. I mean on your claim.

A. On the Anaconda; yes, sir.

Q. What did you do in 1912?

A. William Lang and I in 1912 sunk a *hold* and put some drifts in in 1912.

Q. What was the value of that work in 1912?

A. It was over $100.00 worth of work.

Q. Did you do any work there in 1913?

A. Yes, sir. In 1913 I gave a lay on the ground and sunk a hole 27 feet deep to bedrock.

Q. Did you sink that hole yourself?

A. I helped sink the hole. Yes, sir.

Q. Did you do any work in 1914?

A. In 1914 I did.

Q. What did you do in 1914?

A. In 1914 I sunk, I believe it was, five holes and cleared timber on the upper end. And also in 1913 I rocked all the gravel out of that hole that we sunk in January.

Q. What was the result of your rocking?

A. I found some gold."

While appellant Adams was living on the claim in January, 1913, working the ground with a boiler and windlass, he was served with a written trespass notice by the Yukon Gold Company, one of the co-tenants, as testified to by him as follows, which is uncontradicted in the evidence (Tr. p. 44):

"Plaintiff's Exhibit 3—Letter, dated January 13, 1913, the Yukon Gold Company to S. C. Adams:

'Flat Creek, Alaska, January 13, 1913.
Mr. S. C. Adams,
Flat City.
Dear Sir:

You are hereby notified that notices, of which the enclosed are copies, have been posted on the Mohawk and Prospector Association claims, and unless you immediately desist from trespassing thereon, and depart and remain away therefrom you will be prosecuted for trespass in the manner provided by law.

Very Respectfully,
The Yukon Gold Company,
By J. Rivers.'

Q. I will show you Plaintiff's Exhibit 3 and ask you if you ever saw that before.

A. Yes, I did.

Q. Where and when?

A. I believe it was January 13th or 14th. I believe it was Mr. Rivers or Kettlewell handed it to me. I would not say which one did. It was when I had a boiler and windlass and was working on the Anaconda Fraction.

Q. Were you on any other part of the Prospector at that time?

A. No, sir.''

We direct the court's attention to the further fact that this notice was served on the appellant Adams on January 13th, 1913, and that subsequently on the 19th of July, 1913, the appellees had still neglected to survey their claim and cast off the excess, and that on said date Adams made his relocation called the ''Anaconda No. 2'', and shortly thereafter commenced this suit to quiet his title to the ground.

We further direct the court's attention to the fact that it was a whole year after serving this

trespass notice upon Adams that The Yukon Gold Company hired a surveyor to survey the claim and cast off the excess, notwithstanding the fact that on the 13th of January, 1913, Adams, with a boiler and windlass, was working the excess ground claimed by him.

The appellant testified (Tr. pp. 48 and 49) that he met Mr. Austin, the manager of The Yukon Gold Company, in August, 1912, and told him about the Anaconda Fraction.

Again, appellant testified (Tr. p. 65) that Mr. Austin had a blue print which showed the Anaconda Fraction.

Mr. Austin, who was conceded to be a mining engineer of large experience (Tr. p. 90), in his testimony for the appellees (Tr. p. 79), admits that he was the resident manager of The Yukon Gold Company where the property was located in 1912, and that he had a conversation in August with Mr. Adams. Again (Tr. p. 80), Mr. Austin testified as follows:

> "Q. At that time did he explain to you where the Anaconda Fraction was located?
> A. Yes, sir. He did.
> Q. Where did he say?
> A. He told me that the claim was located between the Prospector and Mohawk Associations.
> Q. Did he say anything about the Anaconda Fraction being a portion of the original Prospector location?
> A. No, sir. He did not.

Q. At that time, did you show him a map of the Prospector claim and adjoining claims?
A. Yes, sir."

Again (Tr. p. 83), Mr. Austin testified as follows, referring to a blueprint:

"Q. There were pencilings on it that you and Adams made at that time?
A. I think we did make pencil marks on it at that time. Mr. Adams drew a sketch of his property and I think I sketched it in on this map."

Again (Tr. pp. 88 and 89), Mr. Austin testified as follows:

"Q. Did you go to the stakes?
"A. Yes. Not to the stakes. Not to all stakes of the claim; I went to this stake (indicating on map) and found that the Prospector and the Mohawk stakes were at the same point. They were common stakes. There was a common corner for the two claims.
Q. Did you see the Anaconda stake at that time?
A. Yes.
Q. And you didn't take the trouble to go and find out where the other Anaconda stakes were, did you?
A. No, sir.
Q. You knew at that time that Adams was claiming a fraction there 120 feet wide, didn't you?
A. Yes, sir. He told me that. He told me that he was claiming a fraction there and wished to sell it.
Q. He told you the size of it?
A. He probably did. I don't just recall.
Q. He marked it out for you on the map?
A. Yes, sir. Drew a sketch of it.

Q. And some of the other owners of that ground talked to you about that fraction about that time, didn't they?

A. I inquired from some of the owners. I can't recall who they were. I think Mr. Aitken is one, but I am not certain. I discussed it with some of the owners.

Q. Prior to that, William Lang had come to you. He also claimed to be an owner and was an owner, if there was an Anaconda Fraction. He had come to you before that.

A. Yes, sir.

Q. He had also discussed with you the Anaconda Fraction.

A. Yes."

How in the face of this testimony could the trial court find appellees didn't know Adams was claiming an excess in 1912?

8th. That defendant to protect himself perfected his location of the Anaconda No. 2 claim on July 19th, 1913, after more than a reasonable time had elapsed within which said locators and owners of said Prospector Claim should have cast off the excessive area or corrected their lines.

9th. That after this suit was commenced on the 25th of July, 1913, the appellees waited an unreasonable time before attempting to cast off the excess area in January, 1914, thereby rendering their said placer claim fraudulent and void as against appellant, even if we concede for argument appellees had no knowledge of excess prior to commencement of suit.

What is a reasonable time rests upon the facts in each case. The time of the year, the character of the ground, the proximity to the means of making a survey, etc., determines the reasonableness. In the case at bar several seasons were allowed to go by. Chittic and Muckler knew of the excess area in 1911. The town of Flat was upon part of the claim making it particularly easy and accessible to acquire the means of making a survey. Several summers were allowed to elapse where the days are twenty-four hours long. Plats of the ground had been made, and discussed as shown by the evidence of some of the witnesses, stakes had been examined and compared, and trespass notices had been served upon appellant while he was living and working upon the ground in controversy as time went by, but not a single act or thing was done by one of the various owners or their representatives, in disapproving in any manner of the location by appellant of his fraction until after he had relocated the ground and commenced his suit to quiet title. Then after over six months' further time had elapsed, one of the co-tenants (The Yukon Gold Company) caused the ground to be surveyed and attempted to cast off the portion of the claim other than the part located by Adams (Tr. p. 86).

The trial court in rendering its decision (Tr. p. 17) decided that the Anaconda Fraction and the Anaconda No. 2 were fraudulent and void because they were "Shoe String" locations, claiming that

the said claims were not located "as near as practicable with the United States System of Public Land Surveys and rectangular subdivisions of such surveys," and deciding also that there was no necessity for the appellant to stake the said fractions in the manner and shape that they were staked.

The testimony in the case shows that there was a necessity for staking the said fractions in the shape they were staked. The record is undisputed in this regard. It shows that the ground to the south of the Prospector Claim, and bordering upon the southerly line of the Prospector Claim, was appropriated and staked as the "Mohawk Association Claim." Chittic and Muckler told Adams that he could stake the excess fraction off of either side or end of the Prospector Claim. Adams measured the claim and found it was 125 feet wider than the law permitted (1320), and that it was 50 to 75 feet longer than the law permitted (5,280). The record shows that Adams had made a discovery in Flat Creek and it was necessary to take in his discovery (Tr. p. 71). Adams also testified that he staked the fraction off the southerly side of the claim lengthwise along the claim for the purpose of leaving the Prospector in a rectangle, 1320 feet wide by 5280 feet long (Tr. pp. 69 and 70).

The Land Department in the "Snowflake" case, 37 L. D. 250, specifically states that a locator, when necessity compels him, may stake a fraction in any irregular shape and the question of the neces-

sity for so staking in each case is considered separately by the Land Office when application for patent is made.

> "The present attitude of the Department, however, as announced in the case of the Snowflake (37 L. D. 250) discourages, if not inhibits, the laying of the lines of a placer claim over prior claims or other segregations. It now permits locations of irregular shape to be made conforming to boundaries of other claims, which eliminates the necessity of making locations in rectangular form for the purpose of securing odd fractions not included in the boundaries of previous locations, a method which, as we have seen, at one time was not favored by the Department." Lindley on Mines, 3rd Edition, Section 448-R, also see Stefjeld v. Espe, 171 Fed. 825.

The case relied upon by appellees, and cited by the trial court (Hanson v. Craig, 170 Fed. 62), was a claim that had been located where there was plenty of virgin, unappropriated public domain, and the facts in the case showed that the locators shifted their stakes from a mile in length to two miles, and for other purposes than mineral appropriation. Most of the "Shoe String" cases mentioned by the courts and the Land Office were irregular claims usually staked for the purpose of corralling or controlling the water in the vicinity where located, or for other purposes than for mineral purposes. We fail to find a single case that holds that a claim like the Anaconda Fraction staked, where all the surrounding ground was appropriated mineral ground, has been held to be a "Shoe String" Claim.

The Land Department in the Snowflake decision, page 257, says:

> "Exception to this rule may be permitted where by reason of prior patents, or other recognized segregations, a tract of vacant land of irregular form is vacant and subject to appropriation, such irregular tract may be located conforming to the boundaries of the segregated tracts. It is possible that other deviations from the rule of conformity may be sanctioned, but the circumstances must be such controlling force that it would be manifestly inequitable to refuse to recognize them. This is a question which must be determined as each case is presented, it being impossible to prescribe any definite rule, which should control all cases."

The court in its decision, and also in its findings, ruled that the appellant had carved his fractions out of the Prospector Claim without making the boundary lines conform or coincide with the original lines of the Prospector. The trial court also says that Adams by his locations had given the Prospector a new or different course or direction. There is not the slightest bit of evidence in the case to support such a finding or ruling. The appellant Adams is uncontradicted in the record in his statements of where and how he located his fractions. See page 38 of the transcript where Adams testifies that he tied his Anaconda Fraction to the Mohawk Association Claim, and that the southerly boundary line was the southerly boundary line of the original Prospector. Again, on pages 47, 48 and 49, appellant testifies to the position of his

fractions and the manner in which he tied them to the Mohawk Claim. Again, on page 51 of the transcript, appellant tells where the lines of the Prospector and Anaconda Fractions were. Again, on page 63, appellant states where his boundary lines were. Again, on page 74 of the transcript, appellant shows that the map (Defendant's Exhibit A) was incorrect in not correctly showing the lines of the Anaconda Fractions.

The appellees never offered any evidence whatever by a single witness to contradict appellant in his testimony as to where he staked his claim. The appellees offered a certain map (Defendant's Exhibit A) (Tr. pp. 76 and 77) in evidence, and the same was received in evidence without any proof of who made it, or whether it was correct or incorrect, with the distinct stipulation in the record (Tr. p. 76) that the map was only for showing and giving a general idea of the properties, but that the markings were admitted not to be correct.

Apparently the trial court ignored the sworn testimony of Adams and looked at this map that was for illustration only and decided that the map was correct and Adams was wrong. There was not a surveyor or other person placed on the stand to be subjected to cross-examination to ascertain whether or not the map (Defendant's Exhibit A) was correct or incorrect. The map is not evidence at all.

Appellant was shown the map (Tr. p. 74) and was particularly questioned with reference to the lines

of the map and he explained that there was an error in the same and yet appellees did not consider the matter of enough importance to call the surveyor, or any other witness, to contradict him. In the face of the testimony of appellant Adams, how could the court be justified in making its findings that Adams in staking his fractions did not stake on one side or did not by his exterior boundaries cover or adjoin any boundary line of the Prospector Association Claim, and that in so doing, the southerly boundary line of the Anaconda No. 2 was not co-extensive with the southerly boundary line of the Prospector Claim? It was on such erroneous findings the trial court based its decree.

Finally, to summarize, we contend that we have conclusively shown from the record that the trial court erred.

1st. In finding that appellant in staking his Anaconda Fraction and Anaconda No. 2 Claim did not cover or adjoin the boundary line of the Prospector Association Claim, or stake on one side thereof.

2nd. In finding that the southerly boundary line of the Anaconda No. 2 was not co-extensive with the southerly boundary line of the said Prospector Claim.

3rd. In finding that on and prior to July 19, 1913, the locators and owners of the said Prospector Claim had no notice or knowledge that their said claim contained an excess area.

4th. In finding that the locators and owners of the said Prospector Claim did not acquire notice or knowledge that their said claim contained an excess area until after this suit was commenced.

5th. In finding that the Anaconda Fraction and the Anaconda No. 2 Claim were null and void as against the said Prospector Claim.

6th. In finding that the said Prospector Claim was valid as against the Anaconda Fraction and Anaconda No. 2 Claim and entitled the appellees to possession of the ground in controversy.

7th. In refusing to find that the said Prospector Claim was fraudulent and void as against the appellant's locations for failure and neglect to cast off the excess area after notice and knowledge thereof.

8th. In entering its judgment and final decree in favor of the appellees and against the appellant, dismissing appellant's suit based upon such erroneous findings.

As we said in the beginning of our argument there was very little conflict in the testimony. The appellees simply contented themselves by denying they had notice or knowledge of the excess area and by proving the location of the Prospector Claim. There was no dispute about the location of either claim. The legal questions raised herein practically all arise on admitted or undisputed facts

in the record. We repeat the Honorable Trial Court made its findings contrary to the facts proven at the trial, and thereafter incorrectly applied the law applicable thereto.

We submit therefore that the case should be reversed on both the findings of fact and the law and that the trial court be directed and ordered to enter its final decree in favor of the appellant in accordance with the prayer of his complaint.

Respectfully submitted,

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